STATE OF CALIFORNIA — Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: March 30, 2004

To: The Commission
(Meeting of April 1, 2004)

From: Alan LoFaso, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **AB 2419 (Campbell) Public utilities: judicial review**
As introduced February 19, 2004

Recommendation:

Summary: This bill is a spot bill to provide a vehicle regarding judicial review of Commission decisions.

Digest: Existing law, the California Constitution, Art. XII, sec. 5, gives the Legislature plenary power over the Public Utilities Commission, including the authority "to establish the manner and scope of review of commission action in a court of record…"

Existing law, P.U. Code sec. 1756, authorizes and aggrieved party before the Commission to petition either the Supreme Court or the Court of appeals for a writ of review for the purpose of having the lawfulness of the original order or decision or the lawfulness of the order or decision on rehearing inquired into and determined.

Existing law, Chapter 855, Statutes of 1996 (SB 1322, Calderon), permitted Courts of Appeal, in addition to the Supreme Court, to review most commission decisions and established the following additional grounds for review of commission decisions:

a) whether the commission failed to proceed in the manner required by law;
b) whether the decision is support by the findings;
c) whether the findings are supported by substantial evidence in light of the whole record; and
d) whether the decision was procured by fraud or was an abuse of discretion.

Existing law, Chapter 886, Statutes of 1998 (SB 779, Calderon), among other things, stated legislative intent to overrule Camp Meeker Water System, Inc. v. Public Utilities Comm'n (1990) 51 Cal. 3d 845 as it pertains to decisions affecting the energy, transportation, and communications industries (and water industries after January 1,

2001). That reform primarily replaced the "any evidence" test of Camp Meeker with the substantial evidence standard for review. (Pacific Bell v. Public Utilities Comm'n (2000) 79 Cal.App.4th 269, 281.)

This bill would make a non-substantive change to P.U. Code sec. 1756.

Analysis: AB 2419 is a vehicle to consider additional, unnecessary changes to the judicial review process of Commission decisions that was extensively debated and discussed in the Legislature in 1996 and 1998 in the context of other legislative decisions opening new markets to competition.

Although AB 2419 is a "spot bill", discussions are underway in Sacramento indicating that AB 2419 may soon be amended to provide for some type of judicial review by right of Commission decisions. The Commission opposed one such proposal last year, offered in AB 840 (Calderon).[1]

Under current law, Commission decisions are challenged by the filing of a petition for writ of review whereby a Court has the discretion to not hear the case if the court determines there is no legal error based on the petition and the answer. This is a review based on the merits. (Pub. Util. Code, §1756; Rules of Court 58; Pacific Bell 79 Cal.App.4th at 281.) This standard should be distinguished from the truly discretionary standard applicable in the Supreme Court to petitions for review, where the court may deny review even where the lower court erred.

The California Court of Appeal, First District, examined the mid-1990s reforms, stating as follows:

> The review method selected for PUC cases by the Legislature benefits both the courts and the parties. It permits the courts to deny summarily those petitions that lack merit and do not raise important issues, and to concentrate their oral argument and opinion writing resources on the meritorious petitions and those nonmeritorious petitions that raise issues significant to the development of the law. It furnishes the parties a quicker and less expensive means than appeal for having the commission's decisions examined by the appellate courts.
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> Although the Legislature did not establish a right to full-blown review by the Court of Appeal, it substantially met the goals expressed in even the early reports, which assumed there would be an appeal-like form of review. The Legislature significantly increased the odds a writ would issue in a given case by directing PUC petitions to a court that could absorb them more easily. Instead of directing all petitions to a seven-justice court with a limited docket, where PUC petitions would compete with automatic appeals in death penalty cases and with petitions for review seeking to clarify and reconcile California law on a variety of

1 See April 16, 2003, Legislative Memo, re: AB 840 (Calderon).

> subjects, the Legislature spread the petitions throughout six appellate districts consisting of nearly 90 justices. The impact of the PUC caseload clearly will be felt less by the Court of Appeal, which can afford to devote more time to each PUC case. (Pacific Bell 79 Cal.App.4th at 281-82.)

Legal Division records show there already is sufficient review of Commission decisions. With respect to Court of Appeal review, the records show the following: 74 filings in the courts of appeal since 1/1/98. The vast majority are petitions for writ of review (one was a motion for stay, which is included since it is the first filing pursuant to expanded judicial review and was denied in a published court of appeal decision, and three were petitions for writ of mandate, which are reviewed under different standards.)

Of the 70 remaining petitions for writ of review, 32 resulted in writs granted and 5 are pending. The rest were dismissed or denied. Several of the denials were issued via published decisions, rather than summary denials, so courts now have the ability to provide in decision form the reasons for denial where they deem it necessary.

Of the 31 writs granted, 16 petitions are pending in the courts, and 15 petitions have been decided by 9 separate court decisions (2 unpublished). Of these 9 decisions, 4 affirm the Commission decisions, 3 reverse the commission decisions, and 2 decisions affirm and in part and annul or remand in part.

Further, it is noted that recently (beginning October 8, 2003), 15 petitions for writ of review have been granted by the Courts of Appeal, involving challenges to 6 Commission's decisions. There has been review granted of a legal challenge to a Commission decision each month beginning in October 2003. (1 petition in October; 10 petitions in November; 2 petitions in December; 1 petition in January; 1 petition in February. The courts are interested in reviewing Commission decisions and are currently providing for meaningful review. It is therefore unnecessary to provide an automatic right of appeal of all Commission decisions. It also appears harmful to the public interest, if it results in more stays of Commission decisions, which are now effective immediately once issued according to statute.

A review of the current standard of review shows that meritorious petitions for writ of review are granted. It is inaccurate to say there is no effective judicial review by the courts of appeal of Commission decisions because the majority of the petitions result in summary denials. As the First District Appellate Court state in Pacific Bell v. CPUC, 79 Cal.App.4th 269, 282, "Any suspicions that the courts may deny writ petitions capriciously are unfounded." As stated by the California Supreme Court, in issuing a summary denial, the court has reviewed the case and decides the issues raised by petitioner on the merits as *res judicata*, although not *stare decisis*. According to the California Supreme Court, petitions in Commission cases serve the office of an appeal. Unlike other writs, they are not to be summarily denied "on policy grounds unrelated to their procedural or substantive merits." (Consumers Lobby Against Monopolies v. CPUC (1979) 25 Cal.3d 899, 900-01. Thus, parties that receive a summary denial have

had their cases reviewed and decided by the court. Because a summary denial is a decision on the merits, mandatory grant of the writ is unnecessary to give guidance to the parties. Parties that receive a summary denial can assume that the court found no merit to their allegations of legal error.

A substantial portion of text of this memo was provided by Mary McKenzie of the Commission's Legal Division.

LEGISLATIVE HISTORY

AB 2419 was introduced February 19, 2004, and referred to the Assembly Judiciary Committee on March 4.

SUPPORT/OPPOSITION

Support: None on file.

Opposition: None on file.

LEGISLATIVE STAFF CONTACT

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Date: March 30, 2004

BILL LANGUAGE:

BILL NUMBER: AB 2419 INTRODUCED
BILL TEXT

INTRODUCED BY Assembly Member Campbell

FEBRUARY 19, 2004

An act to amend Section 1756 of the Public Utilities Code, relating to public utilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 2419, as introduced, Campbell. Public utilities: judicial review.

Existing law authorizes any aggrieved party to petition the court of appeal or the Supreme Court, within specified time limits, for a review of the lawfulness of the original order or decision or of the order or decision on rehearing of the Public Utilities Commission.

This bill would authorize any aggrieved party to petition the court of appeal or the Supreme Court, within the specified time limits, for a review of the lawfulness of the order or decision on rehearing.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1756 of the Public Utilities Code is amended to read:

1756. (a) Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, or at least 120 days after the application is granted if no decision on rehearing has been issued, any aggrieved party may petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of the original order or decision or *the lawfulness* of the order or decision on rehearing inquired into and determined. If the writ issues, it shall be made returnable at a time and place specified by court order and shall direct the commission to certify its record in the case to the court within the time specified.

(b) The petition for review shall be served upon the executive director of the commission either personally or by service at the office of the commission.

(c) For purposes of this section, the issuance of a decision or the granting of an application shall be construed to have occurred on the date ~~when~~ the commission mails the decision or grant to the parties to the action or proceeding.

(d) The venue of a petition filed in the court of appeal pursuant to this section shall be in the judicial district in which the petitioner resides. If the petitioner is a business, venue shall be

in the judicial district in which the petitioner has its principal place of business in California.

(e) Any party may seek from the Supreme Court, pursuant to California Rules of Court, an order transferring related actions to a single appellate district.

(f) For purposes of this section, review of decisions pertaining solely to water corporations shall only be by petition for writ of review in the Supreme Court, except that review of complaint or enforcement proceedings may be in the court of appeal or the Supreme Court.

(g) No order or decision arising out of a commission proceeding under Section 854 shall be reviewable in the court of appeal pursuant to subdivision (a) if the application for commission authority to complete the merger or acquisition was filed on or before December 31, 1998, by two telecommunications-related corporations including at least one which provides local telecommunications service to over one million California customers. These orders or decisions shall be reviewed pursuant to the Public Utilities Code in existence on December 31, 1998.